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No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
October Term, 1992

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AMERICAN COUNCIL OF THE BLIND, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, a division of Pegasus Foundation, Inc., a Colorado non-profit corporation,

*Petitioners,*

*vs.*

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado; NORMAN S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

*Respondents.*

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*Petition for Writ of Certiorari to the*
*United States Court of Appeals for the Tenth Circuit*

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# RESPONDENTS' BRIEF IN OPPOSITION

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NORMAN S. EARLY, JR.
*District Attorney*
*Second Judicial District*
*State of Colorado*
NATHAN B. COATS
*Chief Deputy District Attorney*
*Counsel of Record*
*Attorneys for Respondents*
*303 West Colfax Avenue, 1300*
*Denver, Colorado 80204*
*Telephone: (303) 640-5933*

GALE A. NORTON
*Attorney General*
*State of Colorado*
LARRY D. TANNENBAUM
*Assistant Attorney General*
*Attorneys for Respondents*
*1525 Sherman St., 5th Floor*
*Denver, Colorado 80203*
*Telephone: (303) 866-3617*

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# RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 962 F.2d 1501 (10th Cir. 1992).

## STATEMENT OF THE CASE

That appeal arose from the denial of the petitioner's

motion for attorney fees pursuant to 42 U.S.C. §1988. On June 29, 1988, 2 days before the Colorado Charitable Solicitations Act was to become effective, and the very day that this Courtreported its decision in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), the petitioners filed a suit challenging the constitutionality of the Act, which was joined with two other lawsuits, including one filed by the attorney for the plaintiff in *Riley*, raising claims similar to those he successfully pursued in that case.

Preliminary matters were resolved by stipulation when the respondents immediately notified the petitioners that they had no intention of enforcing the new Act, and the lawsuits were held essentially in abeyance until their merits could be resolved by new legislation enacted on June 5, 1989, which was written and pressed by the respondents after consultation in varying degrees with the three sets of plaintiffs. The plaintiff in one of the other lawsuits agreed not to seek attorney fees, calculating that the minimal claim involved was more valuable in exchange for amendments that it wanted in the new statute. The plaintiff represented by the attorney in *Riley*, stipulated to a fee award of $12,500. The petitioners in this lawsuit went to hearing on their claim for $80,000 on the primary case, with an additional claim for $50,000 incurred in establishing their right to a fee award.

After the hearing, at which the presidents of the two plaintiff charities testified as witnesses for the respondents, the magistrate found that the petitioners were not prevailing parties for purposes of a fee award and therefore did not reach the question of "special circumstances," despite noting that the petitioners' conduct was aggravated by an excessive request for fees. Because of the way in which the charities had been recruited by the telemarketer client of the "plaintiffs'" attorneys,

the control over the lawsuit exercised by the telemarketer throughout, and particularly the severing (almost immediately after the suit began) of the relationships between the charities, who were the named plaintiffs, and the telemarketer, who paid the attorneys, the magistrate also concluded that the counsel lacked standing to pursue a §1988 fee award, which belonged to the charities, and that the conduct of the petitioners' counsel involved a number of ethical violations.

The recommendation was initially adopted in its entirety by the district court but in response to a motion to reconsider, it indicated that it expressed no opinion as to the ethics of the counsels' conduct. Treating the "standing" issue merely as a question whether a fee award could be proper when fees are paid by a third party, the Tenth Circuit disagreed on that point, but upheld the determination that the petitioners were not prevailing parties.

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. The Questions Presented in the petition are not raised by the record because they ignore the factual determination of the district court that *these* petitioners did not "achieve" or "obtain" the relief they sought.

Contrary to the suggestion of the petition's first reason for granting the writ, the lower courts in this case did not misapprehend or misapply this Court's definition of "a significant issue" in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). In *Garland*, since the plaintiff actually won a summary judgment on a point at issue, the court was not concerned with whether it *succeeded* on the issue, but only whether the issue on which it succeeded

was sufficiently *significant* to warrant a fee award. Unlike *Garland*, however, these petitioners received no judicial determination in their favor, either preliminary or permanent, and therefore they could be entitled to a fee award only if they first met the catalyst test by showing that the efforts of their attorneys were a necessary and substantial factor in achieving a change that was required by law. *See Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

This calculus was further complicated in this case by the fact that the statute was challenged by plaintiffs in two other lawsuits, raising different claims for relief and seeking changes that would particularly benefit them, and by the fact that before the statute even came into effect, the respondents were waiting on cases in this Court and the Colorado Supreme Court and never intended to enforce the statute until those courts had spoken, a fact which the magistrate found was made clear to the petitioners. In order to be entitled to a fee award according to these tests, therefore, the efforts of petitioners' counsel, as distinguished from other lawsuits or other factors, had be a necessary and substantial factor in achieving changes in the relationship between the petitioners and the respondents that were both required as a matter of law and not technical or *de minimis*.

The causation question, whether the plaintiffs' counsel were a substantial and necessary factor in achieving particular results, is primarily a factual determination to be upheld unless it is "clearly erroneous." The district court made factual findings that were upheld as not clearly erroneous that the catalyst for the amendments concerning required disclosures by solicitors was the new caselaw and the hard fought efforts of other attorneys for other plaintiffs who, unlike the petitioners, had specifically pursued the first amendment theory that succeeded

in *Riley*. With regard to the other statutory amendments, the court also made various findings not only about necessary and substantial causation, but also about the significance of the amendments, in both the general sense of being legally required and the more specific *Garland* sense of not being technical or *de minimis*. It found no change in which these petitioners met all three tests.

Rather than misapprehending the *Garland* test for significance or reverting to the "central issue" test, the lower courts in this case were concerned with the role played by the attorneys for *these* plaintiffs with regard to specific changes. In those few instances where these attorneys might be said to have had some catalytic effect, such as lengthening from 60 to 90 days the time for paid solicitors to make reports, reducing record retention requirements form 3 to 2 years, and permitting paid solicitors to produce their records upon request rather than maintaining them in state, those courts did not err in finding them insignificant since they were not even legally required. A number of amendments were made in the spirit of cooperation and compromise and simply because they were requested by the petitioners and had no practical consequence for the respondents. While particular lines may eventually have to be drawn with regard to the meaning of "technical or *de minimis*" for purposes of a plaintiff's fee award, it would be inappropriate and unnecessary to do so in a case in which the petitioners have failed to achieve anything that is even legally required, such that they could pass the catalytic effect test.

2. **There is no split in jurisdictions about the relative burdens involved in meeting the catalyst test for §1988 attorney fee awards, and if there were, the issue is not raised by the record in this case because no burden was**

**placed on the petitioners below.**

The petition's second reason for granting the writ suggests that there is a split among the jurisdictions with regard to the placement of the burden to establish the causal element of the catalytic effect test, which controls when a plaintiff has not received any favorable judicial determination in his lawsuit. Such a split is not demonstrated by the two cases cited in the petition, both of which purport only to give particular instructions on remand for resolution of questions raised in particular factual contexts. In any event, however, the petitioners never raised any question about the test for establishing a catalytic effect below, and neither the findings of the district court nor the rulings of the appellate court depended upon a failure of the petitioners to meet any burden in establishing causation.

As the two-prong test of *Nadeau* was set out by the magistrate, it was burden neutral, and the magistrate's factual findings concluded that these petitioners were not the cause of any significant change - not merely that the cause was insufficiently established. Unlike the two cases cited in the petition, the determination of causation was not based on an assertion of the respondents as to their motive but upon evidence of the existence and timing of other lawsuits, caselaw, and negotiations with other parties, all of which was equally available to the petitioners. Despite the efforts of the petitioners to find a controversy over a legal standard which might be grounds for granting certiorari, the determination below was a factual one and neither the record nor the opinion involves any legitimate dispute of law.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

NORMAN S. EARLY, JR.
*District Attorney*
*Second Judicial District*
*State of Colorado*
NATHAN B. COATS
*Chief Deputy District Attorney*
*Counsel of Record*
*Attorneys for Respondents*
*303 West Colfax Avenue #1300*
*Denver, Colorado 80204*
*Telephone: (303) 640-5933*

GALE A. NORTON
*Attorney General*
*State of Colorado*
LARRY D. TANNENBAUM
*Assistant Attorney General*
*Attorneys for Respondents*
*1525 Sherman St., 5th Floor*
*Denver, Colorado 80203*
*Telephone: (303) 866-3617*